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No. 10-475

In the Supreme Court of the United States

MAHENDER MURLIDHAR SABHNANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it need not conduct harmless-error review because the aiding-and-abetting instructions as a whole clearly and accurately apprised the jury of the applicable law and thus were not erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 599 F.3d 215. The opinion of the district court denying petitioner's motion for a judgment of acquittal (Pet. App. 88a-117a) is reported at 539 F. Supp. 2d 617.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2010. A petition for rehearing was denied on May 12, 2010 (Pet. App. 118a-119a). On July 16, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 11, 2010, and the petition was filed on October 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner (along with his wife, Varsha Sabhnani) was convicted of obtaining the labor of others by force or threat of force, in violation of 18 U.S.C. 1589(a); harboring aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(iii); holding others in a condition of peonage, in violation of 18 U.S.C. 1581(a); document servitude, in violation of 18 U.S.C. 1592(a); and conspiring to commit each of those substantive offenses, in violation of 18 U.S.C. 371 and 8 U.S.C. 1324(a)(1)(A)(v)(I). Pet. App. 3a. The convictions stemmed from petitioner's mistreatment of two Indonesian domestic servants, Samirah and Enung, who were forced to labor and subjected to abuse in petitioner's residence. *Id.* at 90a. Petitioner was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3a. The court of appeals affirmed. *Id.* at 1a-87a.

1. Petitioner, a naturalized United States citizen from India, and his wife, Varsha, a naturalized United States citizen from Indonesia, arranged for two Indonesian women to travel to the United States to work for them illegally as domestic servants. Pet. App. 4a-5a. Samirah, a 53-year old woman from Indonesia who did not speak English, traveled with Varsha's mother to the United States in 2002. *Id.* at 5a. Petitioner and Varsha met Samirah at the airport and drove her to their house, where Varsha took Samirah's passport and other documents and locked them away until April 2007, after the passport had expired. *Id.* at 5a-6a. During that period, Samirah worked as a domestic servant for petitioner and Varsha, performing chores in their house and in peti-

tioner's office, which was located inside the house. *Id.* at 6a, 91a.

Petitioner and Varsha did not provide Samirah with a bed to sleep in; nor did they provide her with adequate food, clothing, or opportunities to sleep. Pet. App. 6a-7a. Samirah was forced to eat food from the garbage, and she wore clothes made from old rags. *Ibid.* She also experienced "extremely harsh physical and psychological treatment." *Id.* at 7a. For example, Varsha beat Samirah with a rolling pin and other household objects, burned her with scalding water, mutilated her ears, and cut her body and face with a knife. *Id.* at 7a-8a. As punishment for various infractions, Varsha forced Samirah to eat large quantities of chili peppers until she vomited or lost control of her bowels, to walk up and down flights of stairs, and to take numerous baths while clothed and then work in the wet clothes. *Id.* at 8a, 91a-92a. Varsha told Samirah that petitioner would kill her if she resisted. *Id.* at 8a. When Samirah asked to return to Indonesia, Varsha told her that she would have to pay the travel costs, and Varsha told Samirah that if she ran away, her children would be killed and Varsha would report her to the police. *Id.* at 9a.

Petitioner often scolded Samirah and ordered her to undertake various tasks, including cleaning the bathroom in his office and performing housework at another residence. Pet. App. 9a, 95a. Petitioner also witnessed Samirah's injuries and observed her eating from the trash, sleeping in the bathroom, and wearing wet rags. *Id.* at 10a-11a, 95a. Petitioner would tell Varsha about misdeeds that he perceived Samirah to have committed, and Varsha would then inflict physical punishment upon Samirah. *Id.* at 10a, 95a.

In late 2004 or early 2005, Enung, a 47-year-old woman from Indonesia who did not speak English, traveled to the United States with Varsha's sister and brother-in-law to work illegally for petitioner and Varsha. Pet. App. 11a. As with Samirah, petitioner and Varsha met Enung at the airport and drove her to their house, where Enung's passport and travel documents were confiscated and locked away until they were discovered by the police in mid-2007. *Ibid.* Like Samirah, Enung was denied adequate food, sleep and necessary medical care. *Ibid.* Varsha also subjected Enung to beatings and other physical and psychological abuse. *Id.* at 12a-13a, 92a-93a. On one occasion, petitioner watched and laughed while Enung was punished. *Id.* at 95a, 114a.

One of petitioner's business employees observed some of Samirah's injuries, provided the women with food, and mailed letters from the women to their families detailing their abuse. Pet. App. 13a-15a, 96a. Other employees saw Samirah wearing rags and, along with petitioner, watched the women perform manual labor around the house. *Id.* at 95a-96a.

Samirah eventually escaped and was taken to a hospital, where her treating physician diagnosed "[m]ultiple physical abuse." Pet. App. 16a (citation omitted). After the police were notified, authorities searched petitioner's house and rescued Enung. *Id.* at 16a-17a.

2. Petitioner and his wife were indicted on charges of forced labor, harboring aliens, peonage, document servitude, and conspiracy to commit each of those four substantive offenses. Pet. App. 90a. The district court conducted a seven-week trial, during which the jury heard testimony from Samirah and Enung, other employees of petitioner, the physician who treated Samirah

after her escape, and law enforcement officers. *Id.* at 13a, 19a.

In its instructions on the substantive offenses, the court told the jury that, in addition to the possibility of finding either defendant guilty as a principal, the jury could also find a defendant guilty under an aiding-and-abetting theory. 12/11/07 Tr. 5034-5037 (forced labor); 12/12/07 Tr. 5074-5077 (harboring aliens); *id.* at 5099 (peonage); *id.* at 5120 (document servitude). In that regard, the court instructed the jury that

> [i]n order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate herself or himself in some way with the crime and that she or he willfully and knowingly seek by some act to help make the crime succeed.
>
> Participation in a crime is willful if action is taken voluntarily and intentionally or in the case of a failure to act with the specific intent to fail to do something the law requires to be done, that is to say, with a bad purpose either to disobey or to disregard the law.
>
> The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. * * *
>
> * * * An[] aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

Pet. App. 134a (12/11/07 Tr. 5035-5036).

Thereafter, the court instructed the jury to ask the following questions when determining whether a defendant aided and abetted the commission of a crime:

> Did the defendant participate in the crime charged as something she or he wished to bring about?
>
> Did the defendant associate herself or himself with the criminal venture knowingly and willfully?
>
> Did the defendant seek by her or his actions to make the criminal venture succeed?

Pet. App. 134a-135a (12/11/07 Tr. 5036).

The court explained that if the jury's "answer to any one of these series of questions is no, then the defendant is not an aider and abettor and you must find him or her not guilty as to aiding and abetting." Pet. App. 135a (12/11/07 Tr. 5037). The jury found petitioner and his wife guilty of all the charges against them. *Id.* at 20a, 97a.

3. Petitioner moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). Pet. App. 89a. Petitioner raised various challenges to the sufficiency of the evidence, including a claim that the evidence was insufficient to find him guilty as an aider and abettor based on a failure to act because there was no evidence that he had a duty to act and failed to do so. *Id.* at 115a. The district court denied petitioner's motion. *Id.* at 88a-117a. As relevant here, the court ruled that "despite [petitioner's] claim that he could not be guilty as an aider and abettor for failing to act because he had no duty to act," "there was sufficient evidence at the trial to prove that [petitioner] affirmatively acted with the specific intent to advance the crimes" charged. *Id.* 116a. The court found that petitioner "permitted and, to some extent, participated" in the "deplorable

conditions as to Samirah and Enung." *Ibid.* The court further found that petitioner's actions "aided the underlying criminal endeavors" and that he "took affirmative action in support of the crimes charged." *Ibid.*

The district court sentenced petitioner to concurrent prison terms of 40 months on each of the 12 counts of conviction, including the conspiracy counts. Judgment 3. The court also sentenced petitioner to three years of supervised release following his imprisonment, a $12,500 fine, and a $1200 special assessment. Judgment 4, 6, 7. The court further ordered that petitioner pay restitution to the victims and forfeit his ownership interest in the house where the offenses were committed. Judgment 5.

4. On appeal, petitioner challenged the validity of the aiding-and-abetting instructions. Pet. App. 30a. In particular, he argued that the portion of the instructions addressing willfulness permitted the jury to find him guilty for failing to act and that he could not validly be convicted on that basis because the criminal statutes under which he was charged do not predicate liability on a failure to act and the jury was not told that he had any common law duty to act. *Ibid.*

The court of appeals rejected petitioner's challenge and affirmed his convictions. Pet. App. 1a-87a. The court noted that an allegedly erroneous jury instruction warrants reversal only where there is "both error and ensuing prejudice." *Id.* at 31a (citation omitted). The court explained that an instruction is erroneous if, when viewed as a whole, it "either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Ibid.* (citation omitted). The court also noted that "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the

context of the overall charge." *Ibid.* (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)).

The court of appeals stated that it found "dubious" the government's argument that, assuming that the aiding-and-abetting instructions permitted the jury to find petitioner guilty based on a failure to act, that would have been a valid basis for conviction. Pet. App. 31a; see *id.* at 31a-34a. The court concluded, however, that it "need not decide the question whether in the circumstances of this case [petitioner] could properly be convicted based upon an omission to act," because the court "reject[ed] [petitioner's] claim that the district court's instruction on willfulness, considered in the context of the aiding and abetting instruction as a whole, rendered the instructions so confusing as to permit the jury to convict him on this basis." *Id.* at 34a. Instead, the court of appeals found that "the aiding and abetting instruction, considered as a whole, adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." *Id.* at 39a.

The court of appeals observed that the challenged portion of the instruction—which explained that participation in a crime is "willful" not only when "action is taken voluntarily and intentionally" but also "in the case of a failure to act, with specific intent to fail to do something the law requires"—"was not inaccurate," but only "extraneous to this case." Pet. App. 34a. And the court concluded that the remainder of the instruction "was perfectly clear" that the jury could find petitioner guilty only if he affirmatively acted to assist the crimes, thus "removing the possibility of any confusion on the jury's part." *Id.* at 37a.

The court of appeals noted that "immediately before the instruction on willfulness, the jury was informed

that '[i]n order to aid or abet another to commit a crime, it is necessary that the defendant * * * seek *by some act* to help make the crime succeed." Pet. App. 34a-35a (quoting Tr. 12/11/07 5035). In addition, the court observed, "[i]mmediately after the challenged language, the jury was instructed that the 'mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting.'" *Id.* at 35a (quoting 12/11/07 Tr. 5036). The court also noted that the need for affirmative action by the defendant "was further stressed in the judge's summary of the charge," which "instructed the jury to ask itself three questions to determine whether a defendant aided or abetted the commission of a crime," including: "Did the defendant seek *by her or his actions* to make the criminal venture succeed?" *Ibid.* (quoting Tr. 12/11/07 5036). The court of appeals therefore concluded that "the charge's repeated emphasis on the necessity of acting in order to aid and abet, coupled with the crystal clear summary, was sufficient to ameliorate any possible confusion that might conceivably have arisen from the willfulness instruction." *Id.* at 36a.

The court of appeals rejected petitioner's claim that the jury still could have been confused because, in its summation, the government stated that aiding and abetting can be accomplished by "[a] failure to act with specific intent, to fail to do something the law requires." Pet. App. 38a.[1] The court "agree[d] that a party's sum-

[1] The prosecutor argued:

You don't have to have actually committed the crime to be an aider

mation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury." *Ibid.* But the court concluded "that situation is not this case." *Ibid.* The court explained that "the jury instructions, read as a whole, clearly apprised the jury of what it was required to find in order to convict," and made "clear that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions without acting himself." *Ibid.* "[T]o the extent the prosecutor's summation did misstate the applicable law," the court observed, petitioner "raised no objection" in the district court and did not independently challenge the summation in the court of appeals. *Ibid.*

Thus, the court of appeals found, "[t]his was not a case in which the jury instructions" were "such that the jury could have convicted based on a legally erroneous theory." Pet. App. 36a. Instead, the court concluded, "the instructions as a whole adequately conveyed to the jury the law it was to apply." *Id.* at 38a. Given that conclusion, the court of appeals determined that it "need not" consider whether the alleged instructional error was prejudicial. *Id.* at 38a-39a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or an-

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and abettor. All that needs to be established is that somebody else committed the crime, and that you knowingly and willfully associated yourself with that other person in some way to help with the crime. Help with the crime. And that can be done by actions, or it can be done by a failure to act.

A failure to act with specific intent, to fail to do something the law requires.

Pet. App. 38a.

other court of appeals. This Court's review is therefore not warranted.

1. Contrary to petitioner's contention (Pet. 13-25), the decision below does not conflict with any of this Court's decisions providing for harmless-error review of instructional errors. Petitioner's claim that the court of appeals "performed only a truncated harmless-error review that failed to consider the entire record and neglected to place the burden on the government to disprove prejudice" (Pet. 19) rests on the mistaken premise that the court found that the aiding-and-abetting instructions were erroneous. In fact, the court of appeals found that the instructions were *not* erroneous because, "considered as a whole," they "adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." Pet. App. 39a. "Given [the court of appeals'] conclusion that the instructions as a whole adequately conveyed to the jury the law it was to apply," the court correctly determined that it "need not" consider whether the alleged instructional error was prejudicial. *Id.* at 38a-39a.

None of the harmless-error decisions cited by petitioner (Pet. 14-16) supports the remarkable notion that the court of appeals was required to conduct harmless-error review of instructions that it had found were not erroneous. Each of the decisions involved a finding of instructional error. In *Neder v. United States*, 527 U.S. 1 (1999), the government conceded that the district court had erroneously failed to instruct the jury on an essential element of the crime charged. *Id.* at 8. In *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008), the lower courts had found, and the parties agreed, that the jury instructions erroneously permitted the jury to find the defendant guilty under a theory that was legally invalid.

Id. at 530-532. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), after concluding that instructional error had occurred at the defendant's trial, this Court remanded for the court of appeals to conduct harmless-error review. *Id.* at 2934. And, in *Yates* v. *Evatt*, 500 U.S. 391 (1991), the state Supreme Court had found that the instructions at the defendant's trial were constitutionally erroneous because they created mandatory rebuttable presumptions, and the State did not challenge that conclusion in this Court. *Id.* at 402.

The decisions establish that when a court has determined that the jury instructions were erroneous, and the error was of constitutional magnitude, the conviction may be upheld only "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Neder*, 527 U.S. at 16 (citation omitted). And when harmless-error review applies, the government bears the burden of proving that the error was harmless. *United States* v. *Vonn*, 535 U.S. 55, 68 (2002). A reviewing court need not conduct harmless-error review, however, if the court finds that there has been no error. Because the court below found that, taken as a whole, the aiding-and-abetting instructions in this case were not erroneous, this Court's harmless-error cases are inapposite.[2]

[2] The Second Circuit routinely applies harmless-error review when it finds that jury instructions were erroneous. See, *e.g.*, *United States* v. *Jackson*, 196 F.3d 383, 384-389 (1999) (applying *Neder*'s harmless-error analysis after concluding that the trial judge erroneously failed to instruct jury on an essential element of the crime charged), cert. denied, 530 U.S. 1267 (2000). And the Second Circuit is well aware of the appropriate standard for harmless-error review. See, *e.g.*, *United States* v. *Goldstein*, 442 F.3d 777, 781 (2006) ("An erroneous instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."). Accordingly,

Petitioner incorrectly implies (Pet. 16) that the court of appeals concluded that the instructions were confusing and could have misled the jury. The court found that the small portion of the instructions challenged by petitioner—which addressed the meaning of "willful" "in the case of a failure to act"—was, although "not inaccurate," "extraneous to this case." Pet. App. 34a. After examining the instructions as a whole, however, the court concluded that the remainder of "the instructions clarified what was required to convict, and the judge's three-question summary of the charge was perfectly clear, removing the possibility of any confusion on the jury's part." *Id.* at 37a. Thus, far from concluding that the instructions were confusing, the court concluded that the "instructions, read as a whole, clearly apprised the jury of what it was required to find in order to convict." *Id.* at 38a; see *ibid.* (holding that the instructions "were clear that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions, without acting himself").

The court of appeals thus squarely and correctly rejected petitioner's contention that the instructions "permitted the jury to convict petitioner for a naked failure to act." Pet. 19. In reaching that conclusion, the court of appeals followed a long line of this Court's cases directing a reviewing court to consider a challenged instruction "not in isolation but in the context of the entire charge." *Jones* v. *United States*, 527 U.S. 373, 391-392 (1999) (citing *Bryan* v. *United States*, 524 U.S. 184, 199 (1998); *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926)). Consistent

this Court's review is not needed to correct the court of appeals' approach to harmless-error review of instructional errors.

with those cases, the court of appeals correctly examined the aiding-and-abetting instructions as a whole and concluded that their "repeated emphasis on the necessity of acting in order to aid and abet, coupled with the crystal clear summary [by the district court], was sufficient to ameliorate any possible confusion that might conceivably have arisen from the willfulness instruction." Pet. App. 36a. The court further concluded that, given the clarity of the instructions, any misstatement of the law by the prosecutor in his summation (to which petitioner did not object at trial) did not introduce any risk that the jury would be misled. *Id.* at 38a.

In short, as the court of appeals explained, "[t]his was not a case in which the jury instructions" were "such that the jury could have convicted based on a legally erroneous theory." Pet. App. 36a. Accordingly, cases (such *Neder*, *Pulido*, and *Skilling*) that address the harmless-error analysis that applies in that circumstance provide no reason for this Court to review the decision below.[3]

2. This Court's review is also not warranted based on petitioner's contention (Pet. 20-23) that the court below incorrectly applied the Court's decisions, such as *Cupp* and *Park*, governing the standard for assessing whether jury instructions are erroneous. That contention, like petitioner's harmless-error argument, rests on a misreading of the decision below. Although petitioner asserts that the court of appeals held that jury instruc-

[3] Because this case involves neither instructions that permitted the jury to find the defendant guilty based on a legally erroneous theory nor any other situation that calls for harmless-error review, the Court should also reject petitioner's alternative suggestion (Pet. 31) that it grant the petition, vacate the decision below, and remand in light of *Skilling*.

tions must be evaluated "in isolation from the rest of the trial record" (Pet. 20), the court held no such thing.

The court of appeals cited *Cupp* for "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp*, 414 U.S. at 146-147 (citation omitted); see Pet. App. 31a; *id.* at 34a. The court of appeals then correctly applied that well-established proposition to the challenged instruction in this case, concluding that "the aiding and abetting instruction, considered as a whole, adequately conveyed to the jury the necessary and applicable requirements for aiding and abetting." *Id.* at 39a. This Court has followed precisely the same analysis in numerous cases, including *Cupp* itself, concluding that instructions were not erroneous after examining them in their entirety. See *Cupp*, 414 U.S. at 148-150; *e.g.*, *Jones*, 527 U.S. at 391-395; *Victor* v. *Nebraska*, 511 U.S. 1, 1–17, 19-23 (1994).

As petitioner notes (Pet. 20-21), *Cupp* and other decisions of the Court, such as *Park*, also indicate that other aspects of the trial may sometimes be relevant in evaluating whether instructions adequately informed the jury of the applicable law. For example, as the Court explained in *Park*, "[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial*." 421 U.S. at 674-675 (citation omitted). Petitioner is incorrect in contending, however, that the court below rejected that proposition or held that a reviewing court may consider only the instructions themselves in assessing their validity. On the contrary, the court of appeals considered petitioner's argument that the instructions here were rendered unclear by the prosecu-

tor's summation. See Pet. App. 37a-38a. Although the court rejected that argument, the court did not do so on the ground that only the instructions themselves are relevant in assessing whether they may have misled the jury. Instead, the court "agree[d]" with petitioner "that a party's summation can heighten the *already present risk* that an erroneous jury instruction may mislead the jury." *Id.* at 38a. But the court concluded that situation was not present here because the instructions in this case "were *clear* that [petitioner] could not be convicted solely because he knew of [his wife's] crimes or acquiesced in her actions, without acting himself." *Ibid.* (emphasis added); see *ibid.* (stressing that the instructions "*clearly* apprised the jury of what it was required to find in order to convict" (emphasis added)). Given the clarity of the instructions, the court concluded that any possible misstatement of the law in the government's summation, to which petitioner did not object at trial, did not render the instructions misleading. *Ibid.*

Petitioner does not identify any decision of this Court or another court of appeals that conflicts with that analysis. In *Cupp*, the Court considered only the jury instructions themselves in rejecting the contention that they were erroneous. 414 U.S. at 148-150. And, in *Park*, although the Court also reviewed the trial evidence and the prosecutor's summation, the Court's review confirmed its conclusion that the instructions, viewed as a whole, fairly advised the jury of the applicable law. 421 U.S. at 674-676.

The court of appeals decisions cited by petitioner (Pet. 21-23) likewise do not conflict with the ruling of the court below that any misstatement in the prosecutor's summation did not render misleading the district court's otherwise clear instructions. The decision on which peti-

tioner primarily relies, *United States* v. *Bailey*, 405 F.3d 102 (1st Cir. 2005), is entirely in accord with the decision below. In *Bailey*, the defendant challenged the same aiding-and-abetting instruction at issue in the present case. *Id.* at 110. Like petitioner here, the defendant in *Bailey* argued that the willfulness component of the instruction erroneously permitted the jury to find him guilty under a failure-to-act theory. *Ibid.* And, like the Second Circuit here, the First Circuit concluded that, when the willfulness instruction was considered in the context of the entire aiding-and-abetting instruction, it was "highly unlikely" that the instruction "misled the jury to believe that it could convict" the defendant under a failure-to-act theory. *Ibid.* The First Circuit noted that the challenged language, although "extraneous" to the case, was not substantively incorrect and was, in fact, a standard willfulness definition regularly employed by federal courts. *Id.* at 110-111 & n.4 (collecting cases). Moreover, the First Circuit explained that a "clarifying instruction that immediately followed" the challenged willfulness language, identical to an instruction given in this case (see Pet. App. 134a; p. 9, *supra*), "properly safeguarded against any misapplication of the failure-to-act instruction." *Bailey*, 405 F.3d at 110-111.[4]

The other court of appeals decisions cited by petitioner simply state the general proposition that the va-

[4] Contrary to petitioner's contention (Pet. 22-23), the First Circuit in *Bailey* did not uphold the aiding-and-abetting instruction based on the fact that the government had not pursued a failure-to-act theory. The court noted that fact only in explaining why the failure-to-act language was "extraneous." 405 F.3d at 110. The court's conclusion that the challenged instruction was not erroneous rested on the fact that the willfulness language was made "in the context of an otherwise correct seven-paragraph instruction" and was coupled with "a clarifying instruction that immediately followed" the challenged instruction. *Ibid.*

lidity of jury instructions should be evaluated in light of the entire trial record. As discussed above, the court below did not dispute that proposition. Indeed, the Second Circuit has affirmed the validity of the proposition in numerous cases. See, *e.g.*, *United States* v. *Quinones*, 511 F.3d 289, 314 (2007) (noting that statements in instructions that may seem prejudicial on their face may be unproblematic "when viewed in the context of the entire record of the trial" (citation omitted)), cert. denied, 129 S. Ct. 252 (2008); *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1269 (stating that a court "must view the challenged portions of the instruction in the context of the whole trial as observed by the jury"), cert. denied, 519 U.S. 834 (1996); *United States* v. *Torres*, 901 F.2d 205, 240 (explaining that "in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial" (citing *Park*, 421 U.S. at 674)), cert. denied, 498 U.S. 906 (1990); *United States* v. *Birnbaum*, 373 F.2d 250, 257 (1967) ("In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial."). Petitioner's disagreement with how the court of appeals applied that settled rule to the facts of this case does not warrant this Court's review.[5]

[5] Although petitioner asserts (Pet. 24-25 & n.8) that a finding of instructional error would require reversal of not only the substantive counts of conviction but also the conspiracy counts and the forfeiture order, that assertion is incorrect. The aiding-and-abetting instructions applied only to the substantive counts, and petitioner has not challenged the conspiracy instructions, which did not permit the jury to find him guilty based on a failure to act. See 12/11/07 Tr. 5039-5055. Petitioner's reliance (Pet. 24) on *Parr* v. *United States*, 363 U.S. 370 (1960), is misplaced. In that case, the Court held that the conduct the defendants conspired to commit was not in fact a federal crime. See *id.* at 373-394.

3. Petitioner also contends (Pet. 25-29) that, if the Court grants review to address the validity of the aiding-and-abetting instructions, the Court should also grant review on a second question—whether a defendant may be found guilty of aiding and abetting based on a failure to act "where no law establishes a duty to act." Pet. i. Because the question of the validity of the aiding-and-abetting instructions does not warrant this Court's review, the Court should also deny review on petitioner's second question. Moreover, regardless of how this Court disposes of the first question, the second question does not warrant this Court's review.

The second question is not actually presented by this case. As the petition concedes, the court below did not address the question. See Pet. App. 34a (stating that "[w]e need not decide the question whether in the circumstances of this case [petitioner] could properly be convicted based upon an omission to act"); Pet. 25 (acknowledging that the court "skirted" the issue). Moreover, however one reads the jury instructions, they did not permit the jury to find petitioner guilty of aiding and abetting for failing to act "where no law establishes a

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Here, in contrast, a finding that the aiding-and-abetting instructions were erroneous would not establish that the conduct petitioner conspired to commit was not a federal crime. Petitioner's "spillover" argument (Pet. 25) also lacks merit, because all of the evidence introduced at his trial was relevant and admissible to establish his participation in the alleged conspiracy and his role in the substantive offenses, either as a principal or as an aider and abettor based on affirmative action. The fact that petitioner's conspiracy convictions would not be affected by a ruling in his favor is an independent reason for this Court to deny review, because any decision by the Court would have no effect on his term of imprisonment. See p. 7, *supra* (explaining that petitioner received concurrent sentences of 40 months of imprisonment on each count of conviction, including the conspiracy counts).

duty to act." Pet. i. Even if the willfulness language i considered in isolation, the instructions permitted th jury to find willfulness based on a failure to act only i the jury found that petitioner specifically intended "t fail to do *something the law requires to be done*." Pet App. 134a (emphasis added). The government's summa tion did not introduce any ambiguity about the require ment of a legal duty to act. On the contrary, the prose cutor stated that the jury had to find "[a] failure to ac with specific intent, to fail to do *something the law re quires*." *Id.* at 38a (emphasis added).

Even if the question were properly presented, i would not warrant this Court's review. Petitioner doe not allege a conflict among the courts of appeals on th issue. And, despite his contention (Pet. 30) that the gen eral issue of aiding-and-abetting arises frequently i federal prosecutions, petitioner does not (and could not claim that there is a significant number of cases in whic the government pursues aiding-and-abetting liabilit based on a failure to act in the absence of any legal duty Under those circumstances, this Court's review of th second question raised by petitioner is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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